

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95D001C

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON THE MERITS

THOMAS L. MAY, FRANK VALLERO, JOHN WHARRIER,
and the COLORADO ASSOCIATION OF PUBLIC EMPLOYEES,

Complainants,

vs.

DEPARTMENT OF HUMAN SERVICES, OFFICE OF YOUTH SERVICES,
LOOKOUT MOUNTAIN YOUTH SERVICES CENTER, AND THE
DEPARTMENT OF HIGHER EDUCATION, METROPOLITAN STATE COLLEGE OF
DENVER,

Respondents.

The hearing in this matter was held on October 16, 17, 30 and 31,
and November 14 and 16, 1995. The hearing concluded on February
20, 1996, with the filing of Respondents' Surrebuttal Closing
Argument. The hearing was held before Margot W. Jones,
Administrative Law Judge (ALJ).

Complainants appeared at hearing through Vonda Hall, Attorney at
Law. Respondent, Department of Higher Education, appeared at
hearing through Rumaldo Armijo, Assistant Attorney General.
Respondent, Department of Human Services, appeared at hearing
through Stacy Worthington, Assistant Attorney General.

Complainants Thomas May, Frank Vallero and John Wharrier testified
in their own behalf and called the following witnesses to testify
at hearing: Jerald Adamek; Sandi Jones; William Rader; Della
Dickerson; Brad Grater; Mike Wales; Ann Millam; Warren Dunn;
Georgianna Landry; and William Weiner.

Respondents called the following witnesses to testify at hearing:
Noreen Huston; Ken Allikian; Carter White; Raymond Watkins;
Dorothy Snozek; Floyd Kiel; Mike Wales; Johann Murray; Mary
Miller; Aurora Ruiz-Hernandez; Shirley Harris; William Rader;
Sandi Jones; Steve Bates; William Weiner; and Thomas May.

Complainants' exhibits A through F, H through N, W through DD, FF,
JJ through LL, QQ and RR were admitted into evidence without
objection. Complainants' exhibits O through V, MM, and NN were
admitted over objection. Exhibit PP, the State Colleges in
Colorado, Handbook for Professional Personnel, the Glossary, page
2, and Section IV, page 2, was admitted into evidence over
objection.

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Respondents' exhibits 14 through 17, 21, 28 and 30 were admitted into evidence without objection. Respondents' exhibits 1, 2, 4, 18, 19, 20, 23 through 27, and 29 were admitted into evidence over objection.

Complainants' exhibits, which were admitted into evidence during the hearing held on July 24, and 25, 1995, to consider the limited issue of the CAPE's standing to represent the interest of its members in the petition for declaratory relief, are made apart of these proceedings. These exhibits are, as follows: Complainants' exhibits A through C1, C2, C4, C6, D, E3-9 and F.

On October 16, 1995, Respondents submitted a Memorandum of Legal Authorities. Attached to the memorandum are documents marked as Respondents' exhibits 1 through 12. Respondents' exhibits 1 through 12 are made apart of the record in this matter.

Administrative notice is taken of Department of Education, Colorado State Board of Education, Administration of Teacher Certification Act of 1975, 1 CCR 301-15.

MATTER APPEALED

Complainants petition for declaratory relief and appeal a step four grievance decision.

ISSUES

1. Whether Complainants are entitled to declaratory relief.
2. Whether Respondent Department of Human Services' decision to transfer Complainants from teaching positions at Lookout Mountain Youth Services Center to other positions in the Department of Human Services was arbitrary, capricious or contrary to rule or law.
3. Whether exemption of positions at Metro State College was contrary to applicable constitutional provisions, statutes and rules.

PRELIMINARY MATTERS

1. To accommodate the needs of Respondents' witnesses who work at Lookout Mountain Youth Services Center (Lookout Mountain), Respondents' request to hold the hearing at Lookout Mountain for one day of testimony was granted over Complainants' objection.
2. Complainants' request to sequester the witnesses from the hearing room was granted over Respondents' objection.

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3. Respondents' request to alternate advisory witnesses at hearing was denied. Respondent Department of Higher Education identified William Weiner as its advisory witness at hearing. Respondent Department of Human Services identified Jerald Adamek as its advisory witness.

4. Complainants' moved to strike the witnesses identified in Respondents' Supplemental Prehearing Statement filed on October 6, 1995. The witnesses identified are youth offenders who reside at Lookout Mountain. Complainants argued that the witnesses were not properly endorsed and they would be prejudiced if Respondents were permitted to call them at hearing. Complainants' motion to strike was granted.

Respondents' moved for reconsideration of the motion to strike. Complainants' joined in the motion for reconsideration, withdrawing their objection on the grounds of improper endorsement of the witnesses. The motion to reconsider was denied.

5. Complainants argued that the burden of proof in this matter is on the Respondents. Respondents disagreed, arguing that the burden of proof and of going forward in this matter is on Complainants.

The consolidated appeals pertain to a petition for hearing seeking review of a step four grievance decision and a petition for declaratory relief. Therefore, Complainants have the burden of proof and the burden of going forward in this matter. Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991); Board Rule, R9-6-3(B).

6. In its closing argument, Respondents move for reconsideration of the Initial Decision of the Administrative Law Judge, in May, et. al. v. Department of Human Services, et. al., 95D001C, dated September 8, 1995, in which it was found that CAPE has standing to represent the interest of its members in the petition for declaratory relief. Respondents argue that CAPE lacks associational standing and therefore, the Board lack jurisdiction to consider the petition for declaratory relief. The motion for reconsideration is denied.

PROCEDURAL MATTERS

On August 8, 1994, CAPE petitioned the State Personnel Board (Board) for declaratory relief to terminate controversies and remove the uncertainties regarding applicable statutory and constitutional provisions between Complainants and Respondents. On August 22, 1994, Complainants, Thomas May, Frank Vallero and John Wharrier, petitioned the Board for a discretionary hearing to review a step four grievance decision. On September 8, 1994, a Board order was entered consolidating the petition for hearing

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with the petition for declaratory relief.

On November 15, 1994, the Board met and considered the pleading and orders comprising the record in these consolidated cases. In an order dated November 18, 1994, the Board directed the ALJ to conduct an evidentiary hearing to determine whether declaratory relief is appropriate and whether CAPE has standing to pursue this action.

On February 15, 1995, at the parties' request, this matter was bifurcated to allow the issue of CAPE's standing to be considered separately. Hearing was convened February 13, 1995 and concluded on July 25, 1995, on the limited issue of CAPE's standing. Following consideration of the standing issue, an initial decision was entered on September 8, 1995, concluding that CAPE has standing to represent the interest of its members in the petition for declaratory relief. Thereafter, this hearing was held to consider the substantive issues raised by the petition for declaratory relief and the challenge to the step four grievance decision.

FINDINGS OF FACT

1. Complainant Thomas May (May) was employed by Lookout Mountain as a teacher. May worked for the Department of Human Services (DHS), formerly known as the Department of Institutions, for 33 years. He is endorsed in Secondary Level Biological Sciences, and holds an administrators certificate.

2. On July 19, 1994, by certified mail, May received notice that he was being transferred from his position as a teacher with Lookout Mountain to a position at Adams Youth Detention Center teaching in a health initiative, also referred to as health modules.

3. Complainant Frank Vallero (Vallero) was employed by Lookout Mountain as a teacher. Vallero worked for DHS for 34 years. He is endorsed in the areas of social studies and business education. Vallero does not have a teaching certificate. He has a "life certificate" which entitles him to teach for life, without renewing a teaching license or attending continuing education courses. The "life certificate" is no longer issued as a teaching credential by the Colorado Department of Education.

4. On July 21, 1994, by certified mail, Vallero received notice that he was transferred from his position at Lookout Mountain to a health initiative at the Montview Youth Detention Center.

5. Complainant John Wharrier (Wharrier) was employed by Lookout Mountain as a teacher. Wharrier worked for the DHS for 11 years. He is endorsed in the areas of elementary education and

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kindergarten through 12th level educationally handicapped.

6. On July 21, 1994, by certified mail, Wharrier received notice that he was transferred from his position at Lookout Mountain to a position with the Office of Youth Services (OYS) as an educational diagnostician at the Montview Youth Detention Center.

7. Complainants' transfers in July 1994, did not result in a loss of pay, status or tenure.

8. DHS is charged with the responsibility for providing educational services to youth offenders in its custody. Lookout Mountain is the state's largest and most secure facility for juvenile delinquents. Juveniles at Lookout Mountain are remanded to the custody of DHS by court ordered. The average length of incarceration at Lookout Mountain is at least one year. Prior to 1994, educational services to the youths at Lookout Mountain were provided by teachers in the classified service.

9. DHS also operates detention facilities for juvenile offenders or youths awaiting trial. Youths held in the detention facilities stay an average of 11 days. State law requires that youths held in detention facilities be provided educational services by local school districts.

10. OYS has 600 employees and a \$45 million budget. Jerald Adamek (Adamek) is director of OYS.

11. Over the long years of service given by Complainants to Lookout Mountain, many educational programs were offered to the residents there. Courses in reading, writing, math, science and social studies were offered. In addition, business office skills and vocational training in the fields of construction trades, print shop, food services, welding and farming were offered. Electives in junior achievement, Josten's laboratory and physical education were also offered. Special groups were formed for singing, acting, music, art and conflict resolution. A GED was the only degree that could be obtained at Lookout Mountain.

12. Lookout Mountain residents during the years while Complainants were assigned as teachers were also allowed to take vocational training classes at Red Rocks Community College. At Red Rocks, youths could participate in classes in the fields of emergency medical care, car repair, horticulture, construction and food services. Student teachers were infrequently assigned to Lookout Mountain and worked under the supervision of Complainants.

13. During Complainants' tenure at Lookout Mountain, educational programs and theories of education came and went. Funding was a major consideration in determining the types and quality of programs offered there. Under funding of the Department, often

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resulted in a lack of supplies and equipment for the school at Lookout Mountain.

14. Curriculum was determined by various means during Complainants' service at Lookout Mountain. Shortly prior to the year that Complainants were transferred from their positions, the course curriculum was determined by a group of teachers at Lookout Mountain who taught a particular discipline. The teachers met and decided what would be taught to the residents. There was no centralized curriculum planning and no expertise was available to the teachers to assist them in formulating a program for the special needs of the residents at Lookout Mountain. There were no lesson plans prepared by the teachers and the curriculum was loosely adhered to by teachers.

15. Classified teachers worked with the residents 12 months per year. Therefore, there was no time for teachers to attend continuing education classes. Teachers were unaware of teaching techniques that could have interjected new ideas and ways of teaching into the curriculum at Lookout Mountain.

16. During Complainants' assignment there, the youths were difficult to handle in the classroom. Many youths were achieving below grade level. A pattern was observed among the Lookout Mountain residents. Many residents were observed to have been unsuccessful in the school systems to which they were assigned prior to their incarceration. Without educational and/or vocational training during their incarceration, it was observed that there was a high rate of recidivism. The teaching techniques used by Complainants and their colleagues did not hold the youths' attention.

17. During the year preceding the changes that resulted in transfer of Complainants from Lookout Mountain to other positions with the OYS, many teaching positions at the school were left vacant or were filled by temporary employees. While the Lookout Mountain educational programs lacked luster prior to the 1993-1994 school year, it was particularly dull during this school year. There was uncertainty among the staff about job security and rumors abounded.

18. Nonetheless, the basic offering of courses during the 1993-1994 school year constituted an average sampling of the school's course offerings. General math and chapter 1 math was offered. In language arts, general, chapter one and social problem/making decisions through literature was offered. General science was offered. In social studies, general, world history, U.S. history, economics and law related education was offered. Students were permitted to select electives, which included basic skills/GED preparation, physical education, small electronics and health. In the vocational training area, a course in food services was

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offered.

19. In August 1994, OYS and Metro State College (MSC) entered into an agreement whereby MSC agreed to provide educational services at Lookout Mountain. The agreement commemorates a partnership or collaboration between MSC and OYS to deliver educational services to the residents at Lookout Mountain.

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20. The new school at Lookout Mountain was referred to as the Lab School at Lookout Mountain (the Lab School). The intent of the collaboration is to provide a program of remedial, secondary and post-secondary education, vocational training, and transition and support services to assist residents at Lookout Mountain in successful re-entry into society.

21. The youths in the custody of DHS are 85% non-anglo individuals, from urban areas of the state. The further intent of the Lab School program is to provide a training ground for future teachers. The Lab School uses large numbers of student teachers in its program. They do so in order to provide educational training for student teachers. Student teachers learn teaching techniques which will improve the quality of educational services and vocational training provided by urban school districts employing them after graduation.

22. Adamek advised teachers at Lookout Mountain that MSC would operate the Lab School. Teachers were further advised that they could apply for teaching positions with MSC, and if they were not selected or chose not to apply, they would be transferred to other positions in OYS.

23. The teaching positions at MSC are contract positions. These positions are exempt from the classified service. MSC applied to the Colorado Department of Personnel for exemption of the positions of "instructor", "transition specialist" and "principal" at the Lab School. Department of Personnel staff members assisted the executive director of that department in reviewing the exemption requests. Following the review of the exemption requests, the executive director granted the requests.

24. Acceptance of a contract teaching position at the Lab School required the Lookout Mountain teachers to give up the protection and benefits provided by their positions in the classified service. Contract teaching positions at MSC were announced in the area newspapers. Applicants were interviewed and selected by the director of the Lab School and two other MSC employees.

25. Following the interview process, approximately 12 of the former classified teachers at Lookout Mountain were selected for teaching positions at the Lab School. A total of 18 teachers filled the exempt teaching positions at the Lab School.

26. Complainant Wharrier did not apply for a contract teaching position in the Lab School since he did not want to relinquish the rights and benefits afforded him in the classified service. Six classified teachers at Lookout Mountain, including Complainants May and Vallero, applied for the contract teaching positions at the Lab School, and they were not selected for the positions.

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27. These teachers were assigned as the instructors in the health initiatives working under the supervision of Noreen Huston. Federal funding made the creation of the health initiatives possible for the first time in 1994. The staff in the health initiatives consisted of the former classified teachers from Lookout Mountain.

28. The health initiative curriculum was prepared by an expert in the field from MSC, Pat Buckingham. The curriculum is very structured. One week of training was provided to the teachers. The curriculum is contained in a volume provided to the teachers. It directs the teachers what lesson to present during any given class session. The teachers have no input into the curriculum and have no discretion in the order of the lessons presented.

29. The curriculum covers information on human sexuality, pregnancy prevention, paternity, sexually transmitted diseases, violence prevention and stress/negotiation skills. Instruction in these areas is aided by video presentations, books and class discussion. The health initiative program is presented after the normal school day, starting at 3:30 p.m.

30. During the 1994-1995 school year, when the Lab School was first implemented, OYS personnel maintained control over the program. Security at Lookout Mountain is of paramount concern to DHS. MSC staff at the Lab School were trained by DHS employees in security measures to insure safety at the facility. While OYS staff maintained control of the facility, MSC only agreed to the collaboration if they had full authority to operate the Lab School.

31. Ann Millam (Millam), an employee of OYS is the education director. Educational services at facilities run by OYS must comply with requirements of the Colorado Department of Education, the Colorado Department of Corrections and federal regulations. Millam worked with MSC staff to insure that these standards were met during the development of the Lab School curriculum.

32. Funding for the Lab School comes from the OYS budget provided by the general assembly. The amount set aside for the Lab School is based on the full time equivalents as they existed prior to the agreement being entered into with MSC. Title I funds and vocational funds are processed directly through OYS.

33. The agreement creating the Lab School at Lookout Mountain is implement through a management team. Initially, the management team consisted of the Lab School project director, the OYS education director, the director of Lookout Mountain and the Lab School principal.

34. Currently, the management team consists of MSC's Dean of the School of Professional Studies, the Associate Dean of the School

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of Professional Studies, the director and principal of the Lab School, the director of OYS, the director of educational services for OYS and the director of Lookout Mountain. The day to day activities at the Lab School are addressed by the Metro Steering Committee, which is comprised of OYS and MSC employees.

35. The character of the institution at Lookout Mountain has not changed to the extent that it remains a high security residence for juvenile offenders where educational services are provided at the facility. However, what has changed drastically is the enthusiasm, expertise, creativity, know how, resources, training and manpower put into providing educational services.

36. The Lab School offered the residents at Lookout Mountain an applied curriculum intended to show the youths how to use academics for practical purposes. Normative culture was instituted to utilize peer pressure to effect positive behavior changes among the residents.

37. Professors from MSC worked with the contract teachers selected to work at the Lab School to develop a detailed curriculum for each course offered. The curriculum is followed by the classroom teachers. The curriculum is a living document which is frequently changed to meet the needs of the students. MSC supplies materials and equipment to the Lab School. Computers have been donated to the Lab School by MSC. A computerized management system for teachers is being placed in each teacher's classroom to allow student academic and behavioral progress to be monitored.

38. The culinary arts, catering auto repair and electronic programs have been expanded. The teachers are offered extensive training. The use of student teachers and interns has increased since the Lab School opened. During the 1994-1995 school year, 3 student teachers, 15 interns and 5 criminal justice interns worked at the Lab School. During the 1995-1996 school year, 40 to 50 interns worked at the Lab School.

39. During the 1994-1995 school year, students at the Lab School earned 15 GED's and two high school diplomas.

40. Because of the innovative teaching techniques used at the Lab School, the site has been chosen as a place for a national study of the best practices in juvenile correctional education.

DISCUSSION

The parties' arguments turn on the interpretation of constitutional provisions, case law and rules. The following is a discussion of the applicable provisions of law in light of the facts established at hearing and the parties' arguments.

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COMPLAINANTS' PETITION FOR DECLARATORY RELIEF

On November 18, 1994, a Board order entered in which the Board concluded that it did not have enough information before it to determine whether Complainants are entitled to declaratory relief.

The Board assigned the case to an ALJ to make findings on this issue.

The Administrative Procedures Act, section 24-4-105(11) C.R.S. (1988 Repl. Vol 10A), addresses the Board's authority to enter declaratory orders. It provides,

Every agency shall provide by rule for the entertaining, in its sound discretion, and prompt disposition of petitions for declaratory orders to terminate controversies or to remove uncertainties as to the applicability of any statutory provision or of any rule or order of the agency. The order disposing of the petition shall constitute agency action subject to judicial review.

The November 18, 1994, Board order directed the ALJ to be guided in the proceedings by Board Rule, R1-6-3(B). The rule pertains to the burden of proof in a proceeding for declaratory relief. The rule places the burden of proof on the petitioner.

At hearing, Complainants failed to sustain their burden of proof to establish that any applicable statutory provision, rule or order of the Board was at issue in this matter. This matter pertains to the actions of the Department of Personnel, the Department of Human Services and the Department of Higher Education. The ALJ is not aware of, and Complainants have not presented evidence of, any provision of law governing the Board which is at issue here. Therefore, there is no basis upon which to grant declaratory relief.

THE DECISION TO TRANSFER COMPLAINANTS

Complainants contend they were improperly transferred from teaching positions at Lookout Mountain to other positions in OYS.

Complainants argued that the positions to which they were transferred are non-teaching positions and positions for which they do not possess the necessary endorsements. Complainants rely on the Class Series Description for "Teacher I" to argue that because the curriculum was prepared for the health initiatives without their input and they do not exercise discretion to determine the educational process, the health initiative positions are not teaching positions and they were improperly transferred to them.

Respondents contend that it is within the discretion of the

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appointing authority to assign duties and control assignments. It is argued that there was no abuse of discretion or arbitrary or capricious action in Adamek's decision to transfer Complainants.

The Class Series Description provides a three page description of the Teacher I classification. See, Attachment B to Petitioner's Closing Argument Incorporating Legal Authority. In all important respects, the duties performed by Complainants May and Vallero in the health initiative, and by Complainant Wharrier, as a diagnostician, fit the description of the "Teacher I" classification.

Under a constitutional provision, state statute and Board rule, it is established that an appointing authority is responsible for the operation and management of the personnel under his authority and he may appoint individuals to positions, assign duties and designate work locations. Colo. Const., art. XII, § 13(7); Section 24-50-101(3)(d), C.R.S. (1988 Repl. Vol. 10B); Board Rule, R1-4-3(A) and (B). Complainants' challenge to Adamek's decision to transfer them from positions at Lookout Mountain is based on the contention that they have been adversely affected by being placed in positions outside their job classification. In light of the foregoing, the argument fails.

DEPARTMENT OF PERSONNEL'S DECISION TO EXEMPT POSITIONS

Complainants argue that the Department of Personnel acted improperly in granting the request to exempt the teaching and administrative positions at the Lab School. Complainants' contend that the Colorado constitution specifically addresses the right of educational institutions and departments to have faculty positions which are exempt from the state personnel system. However, it is argued that the law also provides that these positions may not be exempt if the educational institutions are reformatory in character.

Complainants contend that the Lab School teaching positions are in an educational institution which is reformatory in character. They further argue that the exempted positions did not require qualifications, including training and experience, comparable to that required of a faculty member at MSC.

Complainants contend that under a line of cases involving the privatization of state functions, Complainants' positions were improperly transferred and the exempt teaching positions were created to replace them. Complainants maintain that the courts have zealously protected the rights created by the Civil Service Amendment, Article XII, §13 of the State constitution. Complainants contend that the exemption of the Lab School positions was a veiled attempt to accomplish by an indirect means that which was clearly forbidden if attempted directly.

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Complainants argue that the Department of Human Services could not have obtained an exemption for the teaching positions at Lookout Mountain. And, it is argued that the exemption of the MSC teaching positions was improper because the positions did not meet the standards established in section 24-50-135, C.R.S. (1988 Repl. Vol. 10B). Therefore, Complainants argue that this case is analogous to the privatization cases in which departments displaced classified employees to replace them with contract employees.

Respondents contend that this is not a privatization case. Respondents contend that MSC is authorized by the state constitution and the applicable statutory provisions to seek exemption of certain teaching positions. Respondents maintain that the exemptions were properly granted by the Department of Personnel. Respondents assert that deference should be given to the determination made by the Department of Personnel with regard to its interpretation of statutes it is charged with administering.

Colorado Constitution, art XII, §13(2), states,

The personnel system of the state shall comprise all appointive public officers and employees of the state, except, . . . faculty members of educational institutions and departments not reformatory or charitable in character, and such administrators thereof as may be exempt by law. . . ."

Section 24-50-135, C.R.S. (1988 Repl. Vol. 10B) governs the exemption of higher education positions. It provides, in pertinent part:

- (1) Administrators employed in educational institutions and departments not charitable or reformatory in character shall include the following, who shall be exempt from the state personnel system:
 - (c) Heads of administrative units and their professional staff assistants who relate directly to the educational function of an educational institution and whose qualifications include training and experience comparable to that required for a faculty member. . . .
- (2) The state personnel director, in consultation with the officers of such educational institutions or departments, shall determine which administrative positions, under definition enumerated above, are exempt from the state personnel system, subject to an appeal to the Board.

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As Respondents argue, the Department of Personnel's interpretation of the above quoted statute which it is charged with administering is entitled to deference. Isbill Association, Inc. v. Jefferson County Board of County Commissioners, 894 P.2d 54 (Colo. App. 1995). The Department of Personnel's action based on its interpretation of the statute cannot be overturned unless the action is shown to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B). The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Aurora Ruiz-Hernandez, Ken Allikian and Shirley Harris, employees who worked in the Department of Personnel during the relevant time period, testified at hearing about the decision to grant MSC's request for exemptions. Each testified that based on the information available to them, the positions were properly exempted.

Ken Allikian testified that in reviewing a request for exemption he does not inquire whether the qualifications for the position are consistent with the qualifications for a faculty position. He testified that he followed a technical bulletin which the Department of Personnel published to offer guidance about exempting positions. Allikian testified that he relied upon the technical bulletin, the position description and transmittal letter, supplied by MSC with the request for exemption, to determine that MSC's request should be granted.

Aurora Ruiz-Hernandez testified that during 1994 she worked in the Department of Personnel assigned to review the impact of contracts on the classified service. She testified that she determined whether the request for exemptions by MSC met the standards defined in section 24-50-135. She testified that she reviews the exemption history of an institution to determine if the past exemptions are consistent with the request before her. She testified that the primary reason she believed that the exemption requests should be granted was because none of the classified teaching staff at Lookout Mountain were losing their positions and the MSC positions were classified as instructors, and this classification was consistent with the requirements of the technical bulletin.

Shirley Harris testified that she was the executive director of the Department of Personnel during the relevant period. She testified that barring an adverse effect on the classified staff at Lookout Mountain, she believed that MSC had the prerogative to

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request an exemption of positions and hire on contract.

It is conceded that the Department of Personnel's interpretation of the relevant statutory provision is not the only interpretation which is apparent. Yet, it cannot be concluded that evidence was presented which established that its interpretation is arbitrary, capricious or contrary to rule or law. In the absence of such a determination, it must be concluded that its decision to grant MSC's request of exemptions was proper.

THE PRIVATIZATION CASES

Complainants contend that Colorado Association of Public Employees v. Department of Highway, 809 P.2d 988 (Colo. 1991) and Colorado Department of Public Employees v. Board of Regents et. al., 804 P.2d 138 (Colo. 1990) support their position that the action of the Respondents was unlawful. This case is not analogous to a privatization cases. In order to consider this analogy it must be established that the positions were improperly exempted. Since Complainants' arguments that the MSC positions were improperly exempted has been rejected, this argument also must fail.

Complainants further contend that under Bardsley v. Department of Public Safety, 870 P.2d 641 (Colo. 1994), they have a right to any newly created position in a state department where the duties assigned to that position are substantially the same duties that they performed in their positions at Lookout Mountain. Again, this analysis fails since the exemptions are found to have been properly granted. If the exemptions were determined to have been improper, Bardsley might be argued to support the conclusion that Complainants should have been afforded lay off rights and that they may have retention rights to the new teaching positions at the Lab School.

CONCLUSIONS OF LAW

1. Complainants failed to establish that they are entitled to declaratory relief.
2. Respondent Department of Human Services' decision to transfer Complainants May, Wharrier and Vallero from Lookout Mountain was neither arbitrary, capricious or contrary to rule or law.
3. The exemption of the positions at the Lab School at Lookout Mountain was neither arbitrary, capricious or contrary to rule or law.

ORDER

1. The Petition for Declaratory Relief is denied.

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2. Respondent Department of Human Services' action transferring Complainants is affirmed. Complainants appeal of the step four grievance decision is dismissed with prejudice.

DATED this 5th day
of April, 1996, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on this 5th day of April, 1996, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON THE MERITS** in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall
Attorney at Law
Colorado Association of Public Employees
1390 Logan Street, Suite 402
Denver, CO 80203

Stacy Worthington
Rumaldo Armijo
Assistant Attorneys General
Department of Law
1525 Sherman Street, 5th Fl.
Denver, CO 80203

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must

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be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

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